ALLIANCE BANK MALAYSIA BHD

v.

CKS TRADING SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD J
[ORIGINATING SUMMONS NO: 24-80-2001(MR)]
21 JULY 2002

LAND LAW: *Sale of land - Order for - Land Code of Sarawak (Cap. 81), s. 148(2)(c) - Application for sale upon breach of overdraft facility - Variation of interest rate in loan - Whether due notice given - Whether mode of computation of interest varied without consent - Whether sum claimable excluded imposition of default interest - Imposition of additional interest - Whether a form of penalty*

The plaintiff was the successor-in-title to Hock Hua Bank (Sabah) Berhad. Previously, the defendant had charged a piece of land to the latter bank as security for an overdraft facility to the sum of RM700,000, repayable with interest thereon, for one Chai Pik Ngok ('the borrower'). The borrower breached the provisions of the said facility and the plaintiff subsequently applied to this court for an order for sale under s. 148(2)(c) of the Land Code of Sarawak (Cap. 81) regarding the said land. The defendant opposed the application, mainly on the grounds that neither the defendant nor the borrower was informed of a variation in the interest rate; that the plaintiff had varied the mode of computation of interest rate without their consent; that the maximum sum claimable from them was limited to RM700,000, inclusive of interest; and that the imposition of additional interest was a form of penalty and also contravened s. 75 of the Contracts Act 1950.

Held:

[1] The statement which appeared in the statement of account sent to the borrower constituted sufficient notice as to the variation of the interest rate. Clause 3 of the memorandum of charge expressly provided for such a notice to be served on the borrower whom the chargor had authorised as its agent to receive it. The defendant had merely alleged that no notice was sent to them, being the chargor of the said property. However, they did not contradict the plaintiff's assertion that such a notice had been sent to the borrower. Therefore, it was considered that they had accepted the notice. (p 625 f-i)

[1a] The interest had been varied in the sense that the base lending rate had been reduced from 9.25% to 6.8%. Thus, even if the plaintiff had failed to notify the defendant as chargor or the borrower of the variation, this would not constitute a sufficient ground for not granting an order for sale and the rate claimed was below the original rate. Additionally, even if the rate claimed was higher than the contracted rate, the court would still grant the order for sale subject to the contracted rate if the variation notice had not been served. (p 626 a-b)

[2] The plaintiff's letter of demand did not refer to the mode of the computation of the interest rate but only to the interest for the time being chargeable on the outstanding amount. Further, the allegation was made by the defendant without any positive averment to their affidavit to enable the plaintiff to reply to the said allegation. (p 626 g-h)

[3] The phrase "up to the aggregate sum of … (RM700,000)" contained in the memorandum of charge was intended to apply only to the principal. The plaintiff was entitled to claim the principal sum of RM700,000 as well as interest as well as interest at the rate prescribed in the memorandum of charge. This interpretation was consistent with the explanation contained in cl. 4 of the said memorandum. (pp 627 h-i & 628 a)

[4] The imposition of interest on the outstanding sum which comprised the principal and interest could not be construed as double and separate interest. Clause 4 specifically provided for the capitalisation of interest and the imposition of interest thereon. Additionally, cl. 51 provided for the imposition of such default interest where the borrower had drawn in excess of the approved limit. The plaintiff had even informed the defendant of the imposition when it was not required to do so. (p 629 b, e)

[Plaintiff's application for order for sale granted.]

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 ***(refd)***
Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd [2000] 1 CLJ 766 ***(foll)***
Bank Bumiputra Malaysia Bhd (Shah Alam) v. Wee Chye Luan & Anor [2001] 1 CLJ 257 ***(refd)***
Citibank NA v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 ***(refd)***
Foo Yoke Foon v. Public Bank Bhd [2000] 3 CLJ 405 ***(refd)***
Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 ***(foll)***
Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***
Multi-Purpose Bank Bhd v. Maimoon Abdul Razak [1999] 3 CLJ 21 ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Perwira Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [1997] 5 MLJ 185 ***(refd)***
Realvest Sdn Bhd v. Co-operative Central Bank Ltd (In receivership) [1996] 3 CLJ 823 ***(refd)***
Tan Fong Guan & Ors v. Malayan Banking Bhd [1974] 1 MLJ 33 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 75
Land Code of Sarawak (Cap 81), ss. 148(1), (2)(c), 151
National Land Code, s. 256(3)
Rules of the High Court 1980, O. 59 r. 3(1)

For the plaintiff - Louis Achuk; M/s Kadir, Wong, Lin & Co
For the defendant - Kenny Yi; M/s Kenny & Co

Reported by M Maheswaran

JUDGMENT

Sulaiman Daud J:

This is the plaintiff's application for the sale of charged property under s. 148(2)(c) of the Land Code of Sarawak (Cap 81) ("the Land Code").

The facts relevant to the present application can be briefly stated. The plaintiff (formerly known as Multi-Purpose Bank Berhad) is the successor-in-title to International Bank Malaysia Berhad (formerly known as Hock Hua Bank (Sabah) Berhad). The defendant is the registered proprietor of that piece of land described as Lot 1653, Lambir Land District ("the said land"). By a memorandum of charge under Instrument No. L.2740/1997 the defendant charged the said land to Hock Hua Bank (Sabah) Berhad as a security for the repayment to that bank of a sum of RM700,000 under an overdraft facility ("the said facility") together with interest thereon granted at the request of the defendant to one Chai Pik Ngok, the borrower (in the memorandum of charge referred to as "the customer").

The borrower, in breach of the covenant under the charge, had exceeded the said facility despite repeated request by the plaintiff for payment to regularise the facility. On 18 March 2001 the plaintiff through their advocates issued a statutory notice against the defendant to pay the total outstanding under the said facility. The defendant having defaulted, the plaintiff took out the present originating summons for the order of sale of the said land under s. 148(2)(c) of the Land Code.

The plaintiff filed seven affidavits as follows:

(a) the affidavit in support of Law Hieng Kuok affirmed on 18 May 2001 ("the plaintiff's first affidavit");

(b) the affidavit in support of Hii Lu Chung affirmed on 14 September 2001 ("the plaintiff's second affidavit");

(c) the affidavit in reply II of Law Hieng Kuok affirmed on 16 November 2001 ("the plaintiff's third affidavit");

(d) the affidavit in reply III of Law Hieng Kuok affirmed on 4 February 2002 ("the plaintiff's fourth affidavit");

(e) the supplementary affidavit of Law Hieng Kuok affirmed on 7 August 2001 ("the plaintiff's fifth affidavit");

(f) the supplementary affidavit of Law Hieng Kuok affirmed on 16 November 2001 ("the plaintiff's sixth affidavit"); and

(g) the supplementary affidavit of Law Hieng Kuok affirmed on 8 February 2002 ("the plaintiff's seventh affidavit").

The defendant opposed the application and filed three affidavits, namely:

(a) the affidavit in opposition of Chai Koh Shon affirmed on 23 August 2001 ("the defendant's first affidavit");

(b) the affidavit in opposition II of Chai Koh Shon affirmed on 17 September 2001 ("the defendant's second affidavit");

(c) the affidavit in opposition III of Chai Koh Shon affirmed on 19 November 2001 ("the defendant's third affidavit").

The defendant in their affidavits in opposition advanced several grounds why it is not just for the court to grant the order of sale. However Mr. Kenny Yi, their learned counsel, in his written submission gave particular emphasis on the following issues, that is to say:

(a) firstly the defendant or the borrower was not informed of the variation of the interest rate;

(b) second the plaintiff had varied the mode of computation of the interest rate without the consent of the defendant or borrower;

(c) third the plaintiff is only entitled to claim a maximum sum of RM700,000 from the defendant;

(d) fourth the imposition of additional interest tantamount to a penalty.

The other issues raised in the defendant's affidavits which were not fully canvassed by their learned counsel in the submission include the issues relating to irregular service of the statutory notice of demand, the failure to issue the notice of demand under the charge before the issuance of the said statutory notice, the failure to show in the statutory notice the amount of accrued interest or the solicitor and client costs. I will firstly deal with these four issues one by one.

Issue (a): Variation Of Interest Rate

The defendant in their affidavits in opposition asserted that they were not informed or served with the notice of the variation of the interest rate. They further claimed that the alleged notice in exh. LHK5 of the plaintiff's first affidavit is not a notice of such variation but is only a statement of the borrower's account. Their learned counsel, Mr. Kenny Yi, also argued that for the plaintiff to invoke the deeming provision as to posting under cl. 53 of the memorandum of charge the plaintiff must prove that there is evidence of posting. The learned counsel cited the Supreme Court case of *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 413 where one of the issues raised relates to the interpretation of a clause in a letter of guarantee dealing with the service of the letter of demand. The said clause read as follows:

> 17. Any notice may be served ... either personally or by sending the same through the post in an envelope addressed to the last known address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it was posted.

It was held that for the deeming provision to apply, it is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. The learned counsel also referred the court to the case *Bank Bumiputra Malaysia Bhd. (Shah Alam) v. Wee Chye Luan & Anor* [2001] 1 CLJ 257 where Idris Yusoff J following *Amanah Merchant Bank Bhd*. observed that "... by exhibiting a copy of the letter (exh. 27), without more, is hardly sufficient to show posting as to contract the deeming clause."

Mr. Louis Achuk, for the plaintiff, referred the court to para. 8, 9 and 10 of the plaintiff's second affidavit where it is asserted that the defendant statement of account (exh. LHK5) was sent by the plaintiff to Chai Pik Ngok, the borrower, at his last known postal address by normal post. The learned counsel

argued that the positive averment therein as to the said postal address was never specifically denied or challenge by the defendant or the borrower and therefore must be taken to have been accepted. By reason thereof he concluded that the service of such notice shall be deemed to be made at the time when the same would in the ordinary course of the post be delivered.

Mr. Louis Achuk further argued that even if no such notice is served by the plaintiff to the defendant such failure is not a ground to refuse the grant of the order of sale under s. 148 of the Land Code. In support he cited the case of *Foo Yoke Foon v. Public Bank Berhad* [2000] 3 CLJ 405 where the Court of Appeal held that the failure to give notice of the variation of interest rate does not amount to 'cause to the contrary' for the grant of the order of sale under s. 256(3) of the National Land Code.

The learned counsel further referred to para. 9 of the plaintiff's fourth affidavit where it is averred that the plaintiff had at all times informed all of their customers, including the defendant, of the revision of the interest rate by posting a notice on the said revision at the banking hall at the plaintiff's branch office in Miri. The learned counsel contended that such posting is sufficient notice for the purpose of cl. 3 of the memorandum of charge.

It appears to me that the said exh. LHK5 is a statement of account of the borrower Chai Pik Ngok, bearing the postal address as set out in the particulars given by him to the defendant (see exh. LHK12). At the foot of exh LHK5 there is written the following statement:

> Our base lending rate is revised to 6.80% per annum with effect from 15th August 1999.

In my opinion the above statement as appearing in the statement of account constitute sufficient notice to the borrower of the variation of the interest rate. Clause 3 of the memorandum of charge expressly provide for such notice to be served on the chargor or customers (borrower) whom the chargor expressly authorised to receive the said notice as their agent. In the instant case the plaintiff has elected to serve such notice to the borrower by incorporating such notice in his statement of account and posting the same to the his last known postal address as set out in the borrower's particulars kept by the plaintiff. The defendant is only alleging that no such notice was made to them as chargor. However the positive assertion by the plaintiff of the service of such notice to the borrower by ordinary post to the borrower's last known postal address was never contradicted by the defendant and therefore must be taken to have been accepted (see *Ng Hee Thoong v. Public Bank Berhad* [1995] 1 CLJ 609). For that reason it is not necessary for the plaintiff to further rely on the deeming provisions as to service under the said cl. 3 or on the other mode of notification.

It is also to be observed that at the time of the execution of the charge the plaintiff's base lending rate was 9.25%. The rate was however reduced to 6.80% by the said variation. Even if the plaintiff has failed to notify either the defendant as chargor or the borrower of the variation of the interest rate, such omission will not in my view constitute sufficient ground for not granting the order of sale since the rate claimed, that is 6.8% + 3.5%, is below the original rate of 11.25%. Even if the rate claimed is higher than the contracted rate the court may still grant the order of sale subject to the contracted rate if no notice of such variation was served (see *Foo Yoke Foon v. Public Bank Berhad*).

Issue (b) – Variation Of Mode Of Computation Of The Interest Rate

The second issue relates to the computation of the interest rate. Mr. Kenny Yi contended that the plaintiff has changed the mode of computation of the interest rate from "per annum on monthly rests" as provided in the memorandum of charge to "per annum" only as set out in the letter of demand (exh. LHK6). The learned counsel cited the case of *Multi-Purpose Bank Berhad v. Maimoon binti Abdul Razak* [1999] 3 CLJ 21 where the plaintiff failed to succeed in a foreclosure action against the chargor when the plaintiff varied the calculation of the interest rate without the consent of the chargor.

The mode of computation of the interest rate as appearing in the memorandum of charge in so far as relevant are as follows:

> ... **together with interest thereon calculated on monthly rests** at the rate of eleven point two five per centum (11.25%) per annum which is two per centum (2.00%) above the chargee's base lending rate ... (emphasis added).

The alleged variation in exh. LHK6 read as follows:

> The total outstanding amount under the said overdraft facility as at 1st day of March 2001 is RM1,026,424.97 with interest still accruing thereon at the rate of 3.5% per annum above base landing rate currently pegged at 6.8% from 2nd day of March 2001 until full and final payment.

Upon close scrutiny of the wording as appearing in exh. LHK6 above it is clear to me that no reference was made therein as to the mode of computation of the interest rate. In my opinion the relevant statement only referred to the interest rate for the time being chargeable on the outstanding amount and cannot be construed as a variation in the computation of the interest rate. Further the allegation made by the learned counsel is solely based on exh. LHK6 without any positive averment in the defendant's affidavit to enable the plaintiff to reply on the said allegation. Thus the issue so raised is baseless and without any merit.

Issue (c) – Plaintiff Only Entitled To The Sum Of RM700,000

Mr. Kenny Yi argued that the defendant is only liable to the plaintiff up to the maximum sum of RM700,000 inclusive of interest. The learned counsel based his argument on that part of the memorandum of charge which read as follows:

> The chargor (s) will on demand pay to the chargee all sums of money which are now or shall from time to time or at any time hereafter be due and owing by the customer ... *up to an aggregate sum of RINGGIT MALAYSIA SEVEN HUNDRED THOUSAND ONLY (RM700,000.00) together with interest thereon calculated on monthly rests at the rate of eleven point two five per centum (11.25%) per annum.* (emphasis added).

The learned counsel argued that the phrase "together with interest thereon" in the aforesaid clause does not mean interest in addition to the principal but it forms part of the principal. Mr. Louis Achuk submitted otherwise. Both the learned counsel however cited the Federal Court case of *Tan Fong Guan & Ors v. Malayan Banking Bhd*. [1974] 1 MLJ 33 as a guide for the interpretation of the said expression. In that case the relevant part of the recital and the operative clause of the charge before the court in so as relevant read as follows:

> ... with the repayment on demand of the balance which on the account ... shall be owing in respect of cheques, bills, notes or drafts ... including all monies ... up to the limit of Dollars Thirty-five thousand only ($35,000.00) for principal and for interest at the rate of 12 per cent per annum ... .

It was held that the limit applies both to principal and interest. However Suffian CJ (as he then was) went further to express his view as follows:

> ... They would have governed only principal (not interest) if the recital had read:
>
> > I, Lim Meng See ... desiring to render the said land available for the purpose of securing to and for the benefit of Malayan Banking Ltd ... the repayment on demand of all sums advanced to me by the Bank in the manner hereinafter appearing up to the limit of $35,000 **(with interest) thereon.** (emphasis added).

In the present case that part of the said clause that require interpretation is the expression "together with interest" which is substantially similar to the expression "(with interest) thereon" in the example set out above. Further according to the *Concise Oxford Dictionary*, 9th edn, the words "together with" means "as well as, and also". It is therefore my considered opinion that the said phrase "up to the aggregate sum of RINGGIT MALAYSIA SEVEN HUNDRED THOUSAND ONLY (RM700,000)" is intended to apply only to

principal. The plaintiff is entitled therefore to claim the principal sum of RM700,000 as well as interest at the rate prescribed under the memorandum of charge. Such an interpretation is also in my view consistent with the explanation given in cl. 4 of the memorandum of charge which read as follows:

> For the purpose of ascertaining whether the limit of the principal sum intended to be hereby secured has been exceeded or not all is accumulated interest and capitalised interest shall be deemed to be interest and not principal sum.

Issue (d) – Imposition Of Additional Interset

The defendant also alleged that the plaintiff had imposed an additional penalty interest in recalling the loan. It is submitted that the additional interest charged by the plaintiff is a penalty in law and therefore contrary to s. 75 of the Contracts Act 1950. The learned counsel for the defendant cited the case of *Realvest Sdn. Bhd. v. Co-operative Central Bank Ltd (In receivership)* [1996] 3 CLJ 823 where it was held that the imposition of default interest at the rate of 20% on sum in arrears (which comprised principal and captilaized interest) in addition to the prescribed rate of interest of 14.5% was void and unenforceable.

The court was also referred to the case of *Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) v. WT Low & Ng Realty Sdn Bhd* [1997] 5 MLJ 185. In that case the defendant contended that interest stated in Form 16D was higher than the prescribed rate in the charge document and therefore the notice was ineffective and invalid. The plaintiff in that case however contended that they were entitled to impose a higher rate of interest due to the borrower's failure to repay and maintain a proper account. The court held that in the absence of any provision for the imposition of the penalty interest the plaintiff was precluded from imposing the same.

In the instant case it is not disputed that the normal rate of interest prescribed under the memorandum of charge is 11.25% per annum, being 2% above the base lending rate of 9.25% at the material time. The amount outstanding as at 18 May 2001 was in the sum of RM1,049,000 with interest accruing thereon at the rate of 3.5% above the base lending rate then pegged at 6.8% from 19 May 2001 until full payment. It is the imposition of the interest on the outstanding sum of RM1,049,000 at the rate 3.5% above the base lending rate that form the basis of the defendant's complaint. According to the learned counsel such outstanding sum is inclusive of principal and interest and the imposition of further interest tantamount to payment of additional and separate interest.

With respect I cannot accept the defendant's contention that an additional and separate interest have been charged on the total outstanding balance. In *Realvest Sdn. Bhd. v. Cooperative Central Bank Ltd (In receivership)* the evidence clearly showed that the default and the prescribed interest were paid side by side which is not the case in the present application. The imposition of interest on the outstanding sum which comprises of principal and interest as in the present case cannot in my view be construed as double and separate interest. It is to be noted that cl. 4 of the memorandum of charge expressly provide for the capitalisation of interest and the imposition of interest thereon. The said clause in so far as relevant is reproduced as follows:

> 4. Subject always to the provisions of the paragraph next following the interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of each calendar month be capitalised and added for all purposes to the principal sum then owing and shall thenceforth bear interest at the prescribed rate and be secured and payable accordingly ... .

It is also my finding that there is no merit in the defendant's contention that the memorandum of charge does not provide for the right of the plaintiff to vary the prescribed rate of interest from 2.0% per annum above the plaintiff's current base lending rate to 3.5% per annum above such rate. The imposition of such default or additional interest in cases where the borrower has drawn in excess of the approved limit is specifically provided in cl. 51 of the memorandum of charge. The plaintiff has also notified the defendant of the imposition of such interest by letter dated 31 January 2001 (exh. LHK13 of the plaintiff's fourth affidavit) even though there is no requirement for the service of such notice under the said clause.

Other Remaining Issues

I now turn to consider the other remaining issues although raised in the defendant's affidavit but were only taken up by their learned counsel in reply to the plaintiff written submission.

First I will deal with the issue relating to the service of the letter of demand. The defendant in their first and third affidavits alleged that the statutory notice issued by the plaintiff is null and void as it was not issued in accordance with the terms of the charge and the service thereof was not made pursuant to s. 208 of the Land Code. With regard to the service of s. 148 notice it is to be noted that the plaintiff has filed in a statutory declaration of service in respect thereof affirmed by one Fevian ak Blackie to the effect that he has served the said notice to one Chai Pek Hian who admitted to him as being one of the directors of the defendant, CKS Trading Sdn. Bhd (see exh. LHK6 in the plaintiff's first affidavit).

Section 148(1) of the Land Code clearly provides that if default be made in the payment of the principal sum, interest or other moneys secured by the charge the chargee may give to the chargor, his personal representatives or assigns notice in writing that the chargee will resort to all available remedies unless such default be remedied. In the Supreme Court case of *Citibank NA v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325 one of the issues before the court was whether there was a failure to serve the s. 148 notice to the customer. His lordship Jemuri Serjan CJ (Borneo) in delivering the judgment of the court made the observation that service on the first defendant who is the shareholder and the general manager of the customer would be sufficient service on the customer. In my opinion the same principle also applies to the present case where service on the director of the defendant shall be taken as sufficient service on the defendant itself.

The other issue raised relates to the condition precedent to an action under s. 148(1) of the Land Code. Mr. Kenny Yi argued that before the notice under that section can be issued there must be prior demand under cl. 1 of the charge. He cited the case of *Citibank NA v. Jong Tze Khiok & Anor*, where his lordship Jemuri Serjan CJ (Borneo) after setting out the steps to be taken by the plaintiff before the issuance of the s. 148 notice stated, at p. 330, as follows:

> It follows therefore, that the demand under cl. 1 of the charge is not a condition precedent to an application under s. 148(2)(c). On the contrary, it is the default on the part of the defendants to make payment on demand that constitutes a condition precedent to an application under s. 148(2)(c).

In the present case it is clear that the plaintiff has, through their advocates, issued to the defendant the notice under s. 148(1) of the Land Code (see para. 12 of the plaintiff's first affidavit). The defendant failed to comply with the requirement of the notice, thus activating the plaintiff's right to apply for the order of sale of the said land. In my view the steps taken by the plaintiff in the present application have met the requirement set out in *Citibank NA* case and the RHC 1980.

The defendant also contended that the statutory notice is void for uncertainty as the said notice fails to particularise the amount of accrued interest or of the solicitor and client costs stated therein. The relevant part of the letter of demand sent by the plaintiff's counsel to the defendant which is relevant to the point in issue read as follows:

> We have been informed by our client that you are the charger of the above captioned in favour of our client in consideration of our client granting to the borrower an overdraft facility of RM700,000.00. We have been further informed by our client that the borrower's account has been overdrawn and as at 1st day of March 2001, you have exceeded the overdraft limit by RM326,424.97. The total outstanding amount under the said overdraft facility as at 1st day of March 2001 is RM1,026,424.97 with interest still accruing thereon ... .

Based on the above extract of the letter of demand I find no merit in the defendant's contention that the statutory notice is void for uncertainty. The total outstanding amount under the charge is clearly stated therein for the plaintiff to satisfy the said demand. Further there is nothing in said s. 148 which can be construed as requiring the plaintiff to particularise in the letter of demand the amount of accrued interest or the amount of the solicitor and client costs.

One other issue that merit consideration is the denial by the defendant of any debt owing by them to the plaintiff. It is apparent that the answer to the issue so raised can be found in the memorandum of charge itself. By cl. 1 of the memorandum of charge the defendant as charger covenanted to pay the plaintiff as chargee on demand all sum of money for the time being due or owing by the borrower therein. Clause 43 thereof constituted the defendant a principal debtor and the said land the principal security for the moneys due under the charge.

In the instant case the plaintiff has issued to the defendant the statutory notice pursuant to s. 148 of the Land Code to which the defendant has defaulted. In the circumstances the plaintiff has the right to pursue the remedies available to them under the charge against the defendant to recover that part of the money due and owing to them by obtaining the order of sale of the security (see *Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79; *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36).

The last remaining issue raised by the defendant is that the statutory notice issued by the plaintiff, which include the claim for legal fees, was invalid on the ground that such claim is contrary to O. 59 r. 3(1) of the RHC 1980 and s. 151 of the Land Code. To deal with the issue raised it is necessary to firstly reproduce the said O. 59 r. 3(1) which read as follows:

> 3(1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court.

Following the principle laid down in the Supreme Court case of *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 an order for sale granted by the court under s. 148(3)(c) of the Land Code is also not a judgment or decree. For that reason I fully agree with the observation made by his lordship Kamalanathan Ratnam J in *Bangkok Bank Bhd v. Chuan Kee Co Sdn Bhd* [2000] 1 CLJ 766, that O. 59 r. 3(1) of the RHC has no place in an application for an order of sale as in the present foreclosure proceedings.

Section 151 of the Land Code in turn provides for the application of the purchase money and is as follows:

> 151. Purchase money arising from any sale under section 150 shall be applied in the order following:
>
> (a) in payment of any rents, taxes, rates and other fees due to the Government;
>
> (b) in payment of the expenses and costs of, and incidental to, the notices, summons and sales;
>
> (c) in payment of the moneys which may then be due or owing to the chargee;
>
> (d) in payment of subsequent charges, if any, in order of their priority and the surplus, if any, shall be paid to the chargor.

In my view the expenses or costs of and incidental to the notices and summons specified in the said s. 151(b) must necessarily include legal expenses which the plaintiff had incurred in enforcing his statutory right under s. 148 of the Land Code. Even if my interpretation of the said para. (b) is wrong in my opinion the inclusion of the claim on legal fees in the said statutory notice will not have the effect of nullifying the said notice.

It is clear from the facts asserted in all of the plaintiff's affidavits that the plaintiff has complied with the condition precedent for making the application for the order of sale. The defendant on the other hand has failed to adduce any evidence to satisfy the court why the order of sale should not be made. In such circumstances I find it just to make the order of sale as prayed.

Accordingly I made the order in terms of prayer (a), (b) and (c) of the originating summons.